

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Denial of the
Application to Renew Class A
Professional Home Care Agency
License Issued to Loving Care Nursing
and Home Care Services, Inc. to
Operate Loving Care Home Services

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Eric L. Lipman on June 4, 2007, at the Office of Administrative Hearings. The hearing record closed following the receipt of post-hearing submissions from the parties on June 18 and June 25, 2007.

Jocelyn F. Olson, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101, appeared on behalf of the Minnesota Department of Health (the Department). John M. Broeker, Suite 151Q, 8120 Penn Avenue South, Bloomington, MN 55431 appeared on behalf of Loving Care Nursing and Home Care Services, Inc. (Respondent or Loving Care).

STATEMENT OF THE ISSUE

Should the application for renewal of Loving Care's Class A Professional Home Care Agency license to operate Loving Care Home Care Services be denied?

FINDINGS OF FACT

1. Respondent was first licensed by the Department in the year 2000, to operate Loving Care Home Care Services (Loving Care) as a Class A Professional Home Care Agency.¹ Loving Care's most recent home care agency license was effective between March 11, 2005 and March 10, 2006.²

¹ See, Testimony of Jean M. Johnston.

² See, Exhibit C.

2. Under its Class A license, Loving Care was obliged to provide at least one of the following home care services: nursing, physical therapy, speech therapy, respiratory therapy, occupational therapy, nutritional services, medical social services, home health aide tasks, or the provisions of medical supplies and equipment when accompanied by the provision of home care service.³

Violations Noted in the Original and Follow-Up Surveys

3. The Department conducted a survey of Loving Care's operations from May 25 to June 8, 2005 (the Original Survey).⁴

4. As a result of this survey, two sets of Correction Orders were issued to Loving Care. On June 3, 2005, the Department issued a Correction Order to Loving Care requiring it to correct within 24 hours potentially life-threatening deficiencies in care and services provided to a ventilator-dependent client with Amyotrophic Lateral Sclerosis (also known as "ALS" or "Lou Gehrig's Disease").⁵

5. As to this client, the lack of clear documentation, training and orientation for Loving Care's employees had disastrous effects. In June of 2005, one of the Licensee's caregivers cut the end off of the client's surgically-implanted feeding tube, such that the client's stomach acid spilled onto his bed, badly injuring the client.⁶ On another occasion, an employee of Loving Care improperly administered an enema, ripping this same client's anus.⁷ Further, because a set of Loving Care staff had not been oriented to a special doorbell activation system that this client used so as to summon caregivers to suction his ventilator tubes, the caregivers would go to the door, and not to the client, whenever the doorbell rang.⁸

6. On October 20, 2005, the Department issued a second set of Correction Orders to Loving Care describing 17 additional violations discovered during the Original Survey.⁹

7. In combination, the violations cited in the June 3 and October 20, 2005, Correction Orders reflect the Department's findings that Loving Care failed to:

³ See, Minn. R. 4668.0012 (3)(A)(1) (2007).

⁴ See, Ex. K; Testimony of Sarah Peterson.

⁵ See, Ex. J and Test of S. Peterson.

⁶ See, Ex. J at 2 and 3; Test of S. Peterson.

⁷ *Id.*

⁸ *Id.*

⁹ See, Ex. K; Test. of S. Peterson.

- a. adequately train the employees caring for vulnerable clients;
- b. prepare written care instructions to staff regarding the services to be provided;
- c. complete written service agreements with its clients;
- d. provide required notices to clients;
- e. maintain state-required documentation of its operations;
- f. complete client care and abuse prevention plans as required by law; and,
- g. request background studies on employees as required by law.¹⁰

8. On the last day of the Original Survey, June 8, 2005, Department reviewers conducted an “exit interview”¹¹ with Rufus A. Adewola.¹² During the exit interview, the two Department reviewers, Sarah Peterson and Susan Gardner, discussed the claimed violations with Mr. Adewola. Additionally, the reviewers provided Mr. Adewola with a draft version of a document entitled “Licensing Survey Form;” a document that detailed both the claimed violations and the related statutes and rules.¹³

9. Indicating that the required corrections were completed, Mr. Adewola signed the October 20 Correction Order document on behalf of Loving Care on November 1, 2005.¹⁴

10. The Department conducted a follow-up survey at Loving Care from November 29 to December 1, 2005 (the First Follow-Up Survey) and discovered that Loving Care had failed to correct 16 of the 18 violations identified during the Original Survey.¹⁵ Additionally, the Department’s surveyors asserted an additional violation of law: By way of a Correction Order dated January 18, 2006, the Department alleged that Loving Care did not have complete prescription

¹⁰ *Id.*

¹¹ See, Ex. K, at 55; Test. of S. Peterson.

¹² Documents in the hearing record make clear that Rufus Adedayo Adewola, stylizes his name differently on different occasions. He is also known as Adedayo Rufus Adewola. See, e.g., Ex. D at 2, 6, and 14; Ex. G at 5 and 7.

¹³ See, Test. of S. Peterson. A final version of this document was later mailed to Loving Care. See, Ex. K at 19 through 44.

¹⁴ See, Ex. K at 2; Test. of S. Peterson.

¹⁵ See, Exs. L at 2 through 11; Ex. H; Testimony of Jeanne Schmitz.

orders for the medications and treatments its employees were providing to three clients.¹⁶

11. On the last day of the First Follow-Up Survey, December 1, 2005, Department reviewers conducted an exit interview with Rufus A. Adewola, and Margenia Williams, of Loving Care's nursing staff.¹⁷ During this interview, Department reviewers, Sarah Peterson and Bonnie Hoskins discussed the claimed violations with Mr. Adewola and Ms. Williams. Additionally, as with the June 2005 exit interview, the reviewers provided Loving Care staff with a draft version of the Licensing Survey Form.¹⁸

12. On January 18, 2006, the Department issued a Notice of Assessment to Loving Care for violations that were identified during the Original Survey that had not been corrected by the First Follow-Up Survey.¹⁹ The Notice both assessed fines in the amount of \$3,250 and informed Loving Care of the right to request a hearing to contest this assessment.²⁰

13. On January 18, 2006, Christina Baltes, R.N., the Department's Staff Education Specialist, hand-delivered the Notice of Assessment to Mr. Adewola. During this meeting Ms. Baltes reviewed the claimed violations and outlined some opportunities for Loving Care staff to receive additional training.²¹ Loving Care did not contest the assessment, but did request permission to remit the assessed fine in two equal installments.²²

14. Business records maintained by the Department establish that the assessment was paid in full on April 6, 2006.²³

15. Indicating that the required corrections were completed as to the one new violation cited in the January 18 Correction Order, Mr. Adewola signed this Order on behalf of Loving Care on January 26, 2006.²⁴

16. The Department conducted a second follow-up survey at Loving Care from April 3 through April 6, 2006 (the Second Follow-Up Survey). During this follow-up survey the Department learned that Loving Care failed to correct 14

¹⁶ See, Ex. L at 12 and 13; *compare also*, Minn. R. 4668.0150 (3) (2007).

¹⁷ See, Ex. L at 33; Test. of J. Schmitz.

¹⁸ See, Ex. L at 14 through 19; Test. of J. Schmitz.

¹⁹ See, Ex. L, at 34 through 49; Test. of J. Schmitz; *see also*, Exs. H and I.

²⁰ See, Ex. L at 49.

²¹ See, Testimony of Christina Baltes.

²² See, Test. of C. Baltes; Ex. O at 1.

²³ See, Ex. O at 2 and 3.

²⁴ See, Ex. L at 12; Test. of J. Schmitz.

violations identified during the Original Survey.²⁵ In addition, Department surveyors discovered four new regulatory violations; each of which resulted in the issuance of a Correction Order on May 18, 2006.²⁶

17. On the last day of the Second Follow-Up Survey, April 6, 2006, an exit conference was held in which Jeanne Schmitz, R.N., detailed the claimed violations. Among the claimed violations were failures to ensure that:

- a. clients had the updated telephone number for the office of the Ombudsman for Older Minnesotans;²⁷
- b. newly-hired employees provided documentation of having tested negative for tuberculosis prior to providing direct care to clients;²⁸
- c. a registered nurse provided written instructions for performing procedures for each client and that these instructions were documented in the clients' records;²⁹ and,
- d. modifications to client service agreements were made in writing;³⁰

Because the new violations highlighted in Second Follow-Up Survey have not been reexamined during a subsequent reinspection of Loving Care, the Department has not yet assessed any penalties for these violations.

18. As to other violations, which had been detected on earlier inspection visits, the Department did issue a Notice of Assessment to Loving Care on May 18, 2006.³¹ This notice assessed fines in the amount of \$6,350 and informed Loving Care of the right to request a hearing to contest the assessment.³² As before, Loving Care did not contest the assessment, but did request permission to remit the assessed fine in installments.³³

19. Business records maintained by the Department establish that the assessment was paid in full on July 27, 2006.³⁴

²⁵ See, Exs. H and M at 2 through 15; Test. of J. Schmitz.

²⁶ See, Ex. M at 16 through 19.

²⁷ Compare, Minn. R. 4668.0030 (4)(B) (2007).

²⁸ Compare, Minn. R. 4668.0065 (1) (2007).

²⁹ Compare, Minn. R. 4668.0100 (4) (2007).

³⁰ Compare, Minn. R. 4668.0140 (1) (2007).

³¹ See, Ex. M at 43 through 58; Test. of J. Schmitz; see also, Exs. H and I.

³² See, Ex. M at 58.

³³ See, Ex. 0 at 4.

³⁴ See, Ex. 0 at 6 through 8.

20. Indicating that the required corrections were completed as to the four new correction orders cited in the May 18 Correction Order, Mr. Adewola signed this Order on behalf of Loving Care on June 28, 2006.³⁵

The Disqualification of Rufus A. Adewola

21. During the Original Survey, Department surveyors noted that Loving Care's files did not include a required background study for Rufus A. Adewola.³⁶ Subsequently, Loving Care submitted a background study form for Mr. Adewola to the Department of Human Services (DHS).³⁷

22. On October 26, 2005, DHS notified Mr. Adewola that he was disqualified as a result of a "conviction for felony check forgery" that had been entered by the District Court of Minnesota on June 22, 1998.³⁸ This letter further informed Mr. Adewola that he could request that the Department of Health reconsider his disqualification if he could detail that the conviction information was in error, or, even if correct, he did not pose a danger to persons receiving services from Loving Care.³⁹

23. Mr. Adewola did not request reconsideration or otherwise challenge the correctness of the information used to disqualify him.⁴⁰ Consequently, on December 5, 2005, DHS sent Loving Care an Order for Immediate Removal, stating: "You are hereby ordered to immediately remove this individual from a position allowing direct contact [with persons receiving services from your facility]."⁴¹

24. On December 30, 2005, the Department sent a letter to Mr. Adewola, notifying him that he was prohibited by Minn. Stat. § 144A.46, subd. 5(a) from being involved in the management, operation or control of Loving Care.⁴² Further, the letter directed Loving Care to remove Mr. Adewola from his position as Administrator, and advised that he could not maintain any position "that involves responsibility for the ongoing management or direction of the

³⁵ See, Ex. K at 2; Test. of S. Peterson.

³⁶ See, Ex. K at 16 (Correction Order No. 16, Employee No. 5) and 54 (Employee No. 5 is "Adewola, Rufus, Administrator/Owner).

³⁷ See, Ex. E at 1.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See, Ex. E at 4.

⁴¹ See, Ex. E at 5.

⁴² See, Ex. F.

policies, services or employees of the provider.”⁴³ Lastly, the letter instructed Mr. Adewola to divest himself of any ownership interest in the licensee.⁴⁴

25. As a reply to the Department’s December 30, 2005 letter, Mr. Adewola informed the Department that Ms. Edileola Adewola was the 100 percent owner of Loving Care.⁴⁵

26. Inexplicably, but quite generously, on January 12, 2006 DHS extended to Mr. Adewola a second opportunity to request reconsideration of his disqualification.⁴⁶

27. By way of a letter dated February 14, 2006, Mr. Adewola requested reconsideration.⁴⁷ In this letter, counsel for Mr. Adewola did not dispute the conviction but asserted that “the criteria used for Mr. Adewola’s disqualification is inaccurate and he should qualify for a [set aside] or variance.”⁴⁸

28. On May 10, 2006, the Department issued its decision refusing to rescind or set aside Mr. Adewola’s disqualification.⁴⁹ The document informed Mr. Adewola that the Department’s decision was a “final agency decision” subject to review if Mr. Adewola filed and served a timely petition for writ of certiorari with the Minnesota Court of Appeals.⁵⁰ Mr. Adewola did not appeal the Department’s decision regarding disqualification.

29. On the day of the hearing, June 4, 2007, Loving Care’s counsel introduced Edileola Adewola as Loving Care’s Administrator. The Department first learned of this claim on the date of the hearing.

License Renewal Application

30. Loving Care’s most recent license had an expiration date of March 10, 2006.⁵¹ On March 24, 2006, Loving Care submitted an application to renew

⁴³ See, Ex. F at 1.

⁴⁴ See, Ex. F at 2.

⁴⁵ See, Test of J. Johnson; *compare generally*, Ex. F at 2.

⁴⁶ See, Ex. G at 1 and 2. The Department suggests in its papers that the Notice was reissued in February of 2006 because the October 2005 Notice did not detail what would follow if Mr. Adewola’s disqualification was set aside pursuant to Minn. Stat. § 245C.23. *Compare*, Ex. E at 2 and Ex. G at 2.

⁴⁷ See, Ex. G at 3 and 4.

⁴⁸ See, Ex. G at 4.

⁴⁹ See, Ex. G at 5 through 7.

⁵⁰ See, *Id.* at 6.

⁵¹ See, Ex. C.

its Class A Professional Home Care Agency license.⁵² The renewal application lists Edileola Adewola as the “100% owner” of Loving Care and lists Mr. Adewola (specifically, “Adedayo R. Adewola”) as Loving Care’s Administrator.⁵³

31. On October 11, 2006, the Department notified Loving Care of its intent to refuse to renew the license.⁵⁴ The Department grounded its refusal upon its determination that Loving Care had operated in violation of applicable statutes and rules.⁵⁵

Procedural Matters

32. Within two weeks of the service of a Notice and Order for Prehearing Conference at the advent of this case, the Department propounded a series of discovery requests to Loving Care.⁵⁶

33. Upon a motion from the Department to compel responses to those requests, the Licensee was directed by the undersigned to complete the past-due responses for discovery by 4:30 p.m. on Wednesday, April 18, 2007.⁵⁷

34. The Licensee made no reply to the Department’s discovery requests within the time established by rule or at any time thereafter.⁵⁸

35. As a sanction for its failure to comply with the Order Compelling Discovery, the undersigned limited Loving Care’s participation in the June 4, 2007 evidentiary hearing. Loving Care was precluded from making factual averments, calling witnesses to testify, or offering exhibits into the hearing record in support of its claim that the proposed denial of the renewal application was in error.⁵⁹ Notwithstanding its failure to provide discovery responses, however, Loving Care was permitted to cross-examine witnesses called by the Department, interpose foundation objections to documentary evidence offered by the Department and to file a post-hearing submission.⁶⁰

⁵² Compare, Ex. C with Ex. D at 1, 5 and 15.

⁵³ See, Ex. D at 6.

⁵⁴ See, Ex. N.

⁵⁵ Compare, Ex. N at 2.

⁵⁶ See, Exs. A, B and *Interim Order on Discovery Sanctions*, OAH Docket No. 8-0900-17632-2 at 1 (May, 7, 2007).

⁵⁷ See, *Interim Order on Discovery Sanctions*, at 1.

⁵⁸ See, Minn. R. 1400.6700 (2005).

⁵⁹ See, *Interim Order on Discovery Sanctions*, at 2.

⁶⁰ *Id.*

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 144A.46 (3)(a) (2006).

2. The Department gave proper notice of the hearing and all relevant procedural requirements of law or rule have been fulfilled.

3. Home care providers are entities that are “regularly engaged in the delivery, directly or by contractual agreement, of home care services for a fee.”⁶¹ “Home care services,” as defined by state law, includes nursing services, personal care services, home management services, and other similar medical services and health-related support services.⁶²

4. The Department is charged with the regulation of “home care providers.”⁶³ Further, state law prohibits a “home care provider” from operating in Minnesota without a license from the Department.⁶⁴

5. Home care licenses are issued for period of one year and may be renewed upon submission of application renewal forms and the renewal fee.⁶⁵

6. While license renewal for most providers is a routine matter,⁶⁶ the Commissioner of Health “may refuse to grant or renew a license, or may suspend or revoke a license, for violation of statutes or rules relating to home care services or for conduct detrimental to the welfare of a consumer.”⁶⁷ Prior to any suspension, revocation or refusal to renew a license, however, the home care provider is entitled to notice and the opportunity for a contested case hearing.⁶⁸

7. State law requires owners and managerial officials of home care agencies to undergo background studies to determine whether they are “disqualified” under Minn. Stat. Chapter 245C. Chapter 144A provides, in relevant part: “No person may be involved in the management, operation, or

⁶¹ See, Minn. Stat. § 144A.43 (4) (2006).

⁶² See, Minn. Stat. § 144A.43 (3) (2006).

⁶³ See, Minn. Stat. §§ 144A.45 (2) (2006).

⁶⁴ See, Minn. Stat. § 144A.46 (1)(a) (2006).

⁶⁵ See, Minn. R. 4668.0012 (13) (2007); Test. of J. Johnson.

⁶⁶ See, Minn. R. 4668.0012 (13) (2007); Test. of C. Baltes.

⁶⁷ See, Minn. Stat. § 144A.46 (3)(a) (2006); *see also* Minn. R. 4668.0012 (15) (2007).

⁶⁸ See, Minn. Stat. § 144A.46 (3)(a) (2006).

control of a [home care] provider, if the person has been disqualified under the provisions of chapter 245C.”⁶⁹

8. Disqualification occurs if the results of the background study, conducted by the Department of Human Services (DHS), show that the person studied has one or more of the disqualifying characteristics set forth in Minn. Stat. §§ 245C.14 and 245C.15. Among the disqualifying characteristics are convictions or admissions to certain crimes,⁷⁰ or a determination that the subject of the study maltreated a minor or a vulnerable adult.⁷¹ A disqualified individual may not provide direct contact services, or have access to, persons receiving services from programs licensed by the Department.⁷²

9. The length of the disqualification period varies depending upon the underlying misconduct. The disqualification period may be permanent or for a specified term of years.⁷³

10. State law defines “managerial officials” as including those individuals who “have the responsibility for the ongoing management or direction of the policies, services, or employees of the home care.”⁷⁴

11. The work roles of Rufus A. Adewola qualify him as a “managerial official” of Loving Care.⁷⁵

12. A conviction for felony-level check forgery is a disqualifying offense under state law, which carries with it a fifteen-year disqualification period.⁷⁶

13. State law permits disqualifications to be set aside if the disqualified individual demonstrates that he or she does not pose a risk of harm to any

⁶⁹ See, Minn. Stat. § 144A.46 (5)(a) (2006).

⁷⁰ See, Minn. Stat. § 245C.15 (2006).

⁷¹ See, Minn. Stat. § 245C.15 (4)(b) (2006).

⁷² See, Minn. Stat. § 245C.14 (1) (2006).

⁷³ See, Minn. Stat. § 245C.15 (2006).

⁷⁴ See, Minn. Stat. § 144A.46 (5)(a) (2006); *accord*, Minn. Stat. § 144A.46 (3)(f) (2006) (“managerial officials” is defined as “those individuals who had the responsibility for the ongoing management or direction of the policies, services, or employees of the home care provider relating to the areas of noncompliance which led to the license revocation or nonrenewal”); Minn. R. 4668.0003 (20) (2007) (“Managerial official” means a director, officer, trustee, or employee of a provider, however designated, who has the authority to establish or control business policy”) (emphasis added).

⁷⁵ Compare, Ex. G at 2 with Ex. D at 2, 5, 6, 12 and 14 and Ex. O at 4 through 8.

⁷⁶ See, Minn. Stat. §§ 245C.15 (2)(a) and 609.631 (2006).

person receiving services from a licensed program.⁷⁷ Mr. Adewola's check forgery conviction has not been set aside by the Commissioner of Health.

14. The Department is required to inspect home care providers, and to issue correction orders and assess civil penalties, as is necessary to ensure observance of state law.⁷⁸

15. State law further provides that if, upon reinspection, the licensee has not corrected the deficiencies that were earlier specified in a Correction Order, a notice shall be issued assessing a penalty for each uncorrected deficiency as provided by rule.⁷⁹

16. State law provides that the Commissioner may suspend, revoke or deny renewal of a license "if the licensee, an owner or managerial official of the licensee . . . is in violation of, or during the term of the license has violated, any of the requirements of this chapter or Minnesota Statutes, sections 144A.43 to 144A.47."⁸⁰

17. Due to Loving Care's serial, serious and repeated violations of state laws relating to home care services, and "for conduct detrimental to the welfare of the consumer,"⁸¹ the Commissioner's refusal to renew the Class A Professional Home Care Agency license is appropriate and warranted.

18. Due to Loving Care's failure to remove Rufus A. Adewola from a managerial role in the company, notwithstanding clear notice of Mr. Adewola's disqualification, the Commissioner's refusal to renew the Class A Professional Home Care Agency license is appropriate and warranted.

19. The Memorandum that follows below details the bases for these Conclusions. To the extent that the Memorandum includes matters that are more appropriately described as Conclusions, the Administrative Law Judge incorporates those items into these Conclusions.

20. Further, the Administrative Law Judge adopts as Conclusions any Findings of Fact that are more appropriately described as Conclusions.

Based upon the above Conclusions of Law, the Administrative Law Judge makes the following:

⁷⁷ See, Minn. Stat. § 245C.21 (3)(3) (2006).

⁷⁸ See, Minn. Stat. §144A.45 (2)(a)(1), (2) and (4) (2006); Minn. R. Ch. 4668.

⁷⁹ See, Minn. R. 4668.0230 (2007); Minn. R. 4668.0240 (2007).

⁸⁰ See, Minn. R. 4668.0012 (15)(A) (2006).

⁸¹ Compare, Ex. N with Minn. Stat. § 144A.46 (3)(a) (2006); Minn. R. 4668.0012 (15) (2006).

RECOMMENDATION

The Administrative Law Judge recommends that the refusal to reissue Loving Care's Class A Professional Home Care Agency license be AFFIRMED.

Dated: July 20, 2007.

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Dianne Mandernach, Commissioner, Minnesota Department of Health, Attention: Appeals Coordinator, 85 East Seventh Place, P.O. Box 64970, St. Paul, MN 55164-0970, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

In urging that its Class A Professional Home Care Agency license be renewed, Loving Care makes four key arguments – namely, that the Commissioner’s failure to renew this license follows from: (1) arbitrary enforcement of the home care agency statutes and rules; (2) an unconstitutional disqualification of Mr. Adewola from managerial and ownership roles in the Licensee; (3) regulatory discipline that is unrelated to the underlying record; and (4) an inequitable refusal to issue a follow-on license. For its part, the Department disputes each of Loving Care’s claims, and emphasizes that Loving Care’s constitutional or equitable claims are not “properly before the Administrative Law Judge or the Commissioner.” Below, each claim is addressed in turn.

The Department is correct, to be sure, that neither the Administrative Law Judge nor the Commissioner has the power to strike down a statute enacted by the legislature on the grounds that the statute violates the state or federal constitution.⁸² Yet it is also true that part of the value of the recommended decision process under Chapter 14 is that independent neutrals may examine the legal claims of regulated parties, and, in appropriate cases, warn Commissioners off of legal error. Without doubt, at the end of the day, the agency head makes the decision for the Executive Branch in licensing matters.⁸³ If, however, an Administrative Law Judge can inform the exercise of this authority before it is completed, it is important that we do so. For these reasons, each of Loving Care’s defenses against the agency’s proposed nonrenewal of the license is examined.

Arbitrary and Capricious Enforcement of the Home Care Agency Rules

When Loving Care makes its claim of discriminatory enforcement, it bears a heavy burden. It must establish that:

- (1) other similarly situated parties have not generally been proceeded against for the same conduct; and,
- (2) the government’s discriminatory prosecution is based upon impermissible considerations (such as the parties’ race or the desire to prevent the exercise of a constitutional right) or is in bad faith.⁸⁴

⁸² Compare generally, *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 368 (Minn. 1977) and *Holt v. Board of Medical Examiners*, 431 N.W.2d 905, 906 (Minn. App. 1998).

⁸³ See, e.g., *Pomrenke v. Comm’r of Commerce*, 677 N.W.2d 85, 93-94 (Minn. App.) review denied (Minn. 2004); *Malloy v. Comm’r of Human Services*, 657 N.W.2d 894, 896-97 (Minn. App. 2003).

⁸⁴ See, *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984) (citing *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 503 (Minn. 1976)).

Loving Care's submissions fall far short of this demanding standard. While the company perhaps wishes the Administrative Law Judge will infer that it has been singled out for regulatory discipline because it is led by persons of color (although it does not explicitly make this claim),⁸⁵ there is nothing in the record to support such a view. Indeed, the pyramiding surveys, re-surveys, offers of training, and detailed specifics on Loving Care's regulatory lapses over the course of more than a year, all suggest that the company was given fair opportunity to understand and meet a uniform set of health and safety standards.

Neither does the small number of refusals to issue license in the Department's history invite the inference that the regulatory action in this case results from an improper motive. The Department does not engage in discriminatory enforcement of its rules simply because one individual (or a small number of persons) refuses to abide by lawful direction.⁸⁶

Lastly, apart from the unadorned claim of counsel, neither of Loving Care's post-hearing submissions make clear how the Department's reading or enforcement of the cited standards is in error. On this record, therefore, the Department's refusal to reissue the Class A Professional Home Care Agency license is well grounded.

Unconstitutional Taking of a Follow-On License

In its post-hearing submissions, Loving Care asserts that the Department of Health's insistence that Mr. Adewola be excluded from management of the company results in an "unconstitutional taking."⁸⁷ The claim has serial defects. First, Loving Care points to no authority which suggests that it (or its owners or employees) has a pre-existing right to deliver home care services without licensure by the Minnesota Department of Health – and it is doubtful that such an unqualified right to practice exists.⁸⁸

Second, assuming that the Legislature may lawfully limit home health care practice to license holders, Loving Care's claim for automatic re-licensure quickly falters. It appears from the underlying record that Loving Care applied for a

⁸⁵ See, e.g., *Loving Care's Post-Hearing Reply Memorandum*, at 2.

⁸⁶ *Compare, Thul v. State*, 657 N.W.2d 611, 616-17 (Minn. App.) *review denied* (Minn. 2003).

⁸⁷ See, *Loving Care's Post-Hearing Memorandum*, at 2.

⁸⁸ See, *Compare, Minn. Ass'n of Pub. Schs. v. Hanson*, 178 N.W.2d 846, 853 (Minn. 1970) ("Though a vested contractual right has been acquired by a teacher under a tenure statute, such a private right is held to be subject to a proper exercise of the police power of the state – the power of the state to impose restraints upon private rights when necessary for the betterment of the general welfare"); *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 566 (Minn. App. 1994) *review denied* (Minn. 1995) (stating that appellant's right to practice medicine was "subject to strict regulation under the state's police power").

renewal of its license after the time that is provided by rule and after its 2006 license had lapsed.⁸⁹ Accordingly, even if Loving Care had a legal right to automatic renewal of its license if it had timely filed, it is very doubtful that it has a constitutionally-protected right to renewal after the most recent license expired.⁹⁰

Finally, as to the propriety of his disqualification and exclusion, the record makes clear that Mr. Adewola has received a good deal of process along the way. Mr. Adewola had all of the procedural guarantees of the criminal process as to the forgery conviction;⁹¹ two rounds of error-correcting procedures under the Background Studies Act;⁹² administrative reconsideration of the disqualification decision;⁹³ and an opportunity to appeal an adverse final decision of the Commissioner of Human Services to the Minnesota Court of Appeals.⁹⁴

On this record, Loving Care's claim that the exclusion of Mr. Adewola violates the guarantee of due process of law is not well taken.

Inadequate Factual Basis for Regulatory Action

Loving Care asserts that withholding re-licensure is not based upon the underlying record. The Administrative Law Judge disagrees.

During the Original Survey the Department noted 18 violations of applicable statutes and rules. Despite the specificity of the cited defects, and Mr. Adewola's representation that these defects had been cured, the First Follow-Up Survey established that very little progress towards regulatory compliance had in fact been made.⁹⁵ At the time of the First Follow-Up Survey, the Department could verify only that two of the 18 earlier violations had been corrected.⁹⁶

⁸⁹ Compare, Minn. R. 4668.0012 (13) (A) (2007) (a "licensee must ... submit an application for renewal on forms provided by the commissioner at least 30 days before expiration of the license") with Ex. C and Ex. D at 1, 5 and 15.

⁹⁰ See, *Arens v. Village of Rogers*, 61 N.W.2d 508, 518-19 (Minn. 1953) *appeal dismissed*, 347 U.S. 949 (1954) ("[I]t is very doubtful whether liquor licensees whose licenses have lapsed at the time of the establishment of the municipal liquor store are deprived of any property without due process of law"); accord, *Littlefield v. City of Afton*, 785 F.2d 596, 602 (8th Cir. 1986) (finding a protected property interest in a building permit conditioned on compliance with all legal prerequisites for receiving permit).

⁹¹ See, generally, Ex. E at 1.

⁹² See, Minn. Stat. §§ 144A.46 and 245C.15 (2006); Ex. E. at 1 through 4; Ex. G at 1 and 2.

⁹³ See, Ex. G at 3 through 7.

⁹⁴ See, Ex. G at 6. Mr. Adewola did not appeal the Commissioner's determination that he was disqualified from providing direct contact services.

⁹⁵ See, Ex. J; Ex. K at 2 through 17; Ex. M at 2 through 14.

⁹⁶ See, Ex. H.

The Second Follow-Up Survey, in April of 2006, revealed still further retreat on Loving Care's regulatory compliance. While the Licensee did cure two more of the original set of 18 violations, the Department's inquiries revealed four new regulatory violations.⁹⁷

More significant still, notwithstanding progressive levels of regulatory discipline, and the imposition of even weighty fines, Loving Care's performance did not improve significantly over the course of three state surveys.

Particularly because home care providers ordinarily work outside of the sight of government officials, or other mandated reporters, Loving Care's serial lapses in supervision, orientation of employees, training and delivery of services presents a particularly troubling set of problems. In very real ways, the agency surveyors may be the only line of defense against neglect or mistreatment of home-bound vulnerable adults. Withholding re-licensure is solidly grounded upon the underlying record.

Equitable Entitlement to Renewal

Lastly, Loving Care asserts that it is entitled, as a matter of equity, to re-licensure as a Home Care Agency.

Estoppel is as an equitable doctrine that urges courts in the judicial branch to prevent parties from asserting their legal rights when doing so would be unconscionable. If justice requires, even government agencies will be estopped by the courts from certain advantages; but application of the doctrine against government agencies (particularly as to exercise of police powers) first requires that the moving party show that the agency has engaged in affirmative misconduct.⁹⁸ This record does not contain any suggestion that the Department either foreswore enforcement of the regulations or otherwise induced Loving Care's regulatory noncompliance. On this record, the prospect of later application of equitable estoppel by the state courts seems remote.

CONCLUSION

For reasons listed above, the Administrative Law Judge recommends that the Commissioner affirm the refusal to reissue Loving Care's Class A Professional Home Care Agency license.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Ridgewood Devel. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980) (a party seeking to apply estoppel against the government has a heavy burden to bear and must show wrongful conduct on the part of the government); *Shetka v. Aitkin County*, 541 N.W.2d 349, 353 (Minn. App. 1995) *review denied* (Minn. 1996) (a party seeking to estop the government "must show the government engaged in affirmative misconduct" and tribunals "must weigh the public interest frustrated by the estoppel against the equities of the case").